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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
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9 EVAN L CARNAHAN,

10 Plaintiff,

11 v.

12 ALPHA EPSILON PI FRATERNITY
13 INC.,

14 Defendant.
15

NO. 2:17-cv-0086-SAB

**ORDER CONTINUING JURY
TRIAL**

16 Before the Court is Defendant David Leon's Renewed Motion to Take the
17 Trial Perpetuation Deposition of David Easlick, or, Alternatively, Motion for Trial
18 Continuance, ECF No. 132. Defendant renews his motion to take a trial
19 perpetuation deposition of Mr. Easlick, an expert on fraternity safety policies and
20 procedures whom Plaintiff originally noted, but subsequently decided not to call.

21 The fundamental issue is whether Defendant may present as his own witness
22 an expert originally retained by Plaintiff, over the objection of Plaintiff, when
23 Plaintiff seeks to reclassify the expert as a consultative expert. The Court denied
24 Defendant's motion to do so originally, ECF No. 121, and denied Defendant's
25 motion for reconsideration, ECF No. 126, but granted leave for Defendant to make
26 a renewed motion or to move for a continuance to allow time for Defendant to
27 secure his own expert on fraternity safety.

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1 Defendant has vigorously sought to ensure that a fraternity expert would be
2 available through this litigation. On April 27, 2018, Plaintiff identified Mr. Easlick
3 as his proposed expert on fraternity safety. The since-dismissed fraternity
4 co-defendant noted Mr. Easlick for a deposition, but withdrew that notice of
5 deposition on June 19, 2018, when they were dismissed from the case. On July 2,
6 2018, discovery closed. In early August, Defendant notified Plaintiff of his
7 intention to use Mr. Easlick as an expert, and Plaintiff informed Defendant of his
8 objection. The parties decided to resolve this issue through motions *in limine*,
9 originally filed on August 13, 2018, and set for consideration on August 30, 2018.

10 Due to a continuance, those motions *in limine* were renoted for consideration
11 at a later date. Defendant then moved to conduct a trial perpetuation deposition of
12 Mr. Easlick, on the assumption that he would be entitled to present Mr. Easlick's
13 testimony, but that Mr. Easlick would be unable to provide it in person at trial.
14 Shortly after that Motion was filed, the case was transferred to this Court, and the
15 pending motions *in limine* were struck with leave to refile consistent with this
16 Court's Scheduling Order. A ruling on the underlying question of whether
17 Defendant would be able to use Mr. Easlick only came on November 22, 2019,
18 more than a year after the original motions *in limine* were set to be considered.
19 None of this delay was attributable to Defendant, who moved for reconsideration
20 promptly after this Court's first order denying leave to depose Mr. Easlick.

21 In the Order denying reconsideration, this Court identified two potential
22 sources of prejudice resulting from allowing Defendant to use Plaintiff's expert as
23 his own: the prejudice resulting from the proximity to trial; and the prejudice
24 resulting from Plaintiff being forced to cross-examine a witness he originally
25 selected and identified. ECF No. 126. The Court was unable to weigh that potential
26 prejudice against the probative value of Mr. Easlick's testimony. In its renewed
27 Motion, Defendant details the potential probative value of a fraternity expert, and

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1 in the alternative, seeks a continuance to allow Defendant to procure his own
2 expert.

3 While the Court denies again Defendant's request to call Mr. Easlick as his
4 own, late-noted expert, it grants the motion for a continuance. A short continuance
5 to allow Defendant to procure an expert, provide an expert report to Plaintiff, and
6 make the expert available to Plaintiff for a deposition will cure both potential
7 sources of prejudice, and the potential probative value of such expert testimony
8 outweighs the delay caused by such a continuance.

9 In deciding whether good cause exists to warrant the grant of a continuance,
10 the Court considers: (1) the diligence of the party seeking a continuance in
11 preparing for trial; (2) the usefulness to the movant of the continuance; (3) the
12 inconvenience a continuance would cause for the opposing party, the witnesses,
13 and the Court; and (4) the prejudice that would result for the movant if the
14 continuance is denied. *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985),
15 amended, 764 F.2d 675 (9th Cir. 1985).

16 The Court finds that Defendant has been diligent in seeking a fraternity
17 safety expert, that a 60-day continuance will provide ample time for Defendant to
18 procure such an expert, that such a continuance will create a substantial
19 inconvenience to other participants or Plaintiff, and that Defendant would be
20 substantially prejudiced if unable to present any expert testimony on fraternity
21 standards.

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1 Accordingly, **IT IS ORDERED:**

2 1. Defendant's Renewed Motion to Take the Trial Perpetuation
3 Deposition of David Easlick, or, Alternatively, Motion for Trial Continuance, ECF
4 No. 132, is **GRANTED**.

5 2. A telephonic status conference will be held on **February 4th, 2020, at**
6 **10:30 a.m.** to discuss the timing of discovery regarding this expert issue, and a
7 new trial date. Participants are to call the Court Conference Line at 1-888-204-
8 5984, with the access code of 6790153. The Parties are encouraged to prepare a
9 joint discovery plan to discuss at this status conference.

10 **DATED** this 13th day of January 2020.

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13 Stanley A. Bastian
14 United States District Judge
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